

Docket No. 193,411

The Workers Compensation Fund requests review of both the Award and the Award Nunc Pro Tunc entered by Administrative Law Judge Nelsonna Potts Barnes dated September 13, 1995 and September 18, 1995, respectively. The Appeals Board heard oral argument on January 23, 1996.

Claimant appeared by her attorney, Steven L. Foulston of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Garry L. Howard of Wichita, Kansas.

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

The Administrative Law Judge awarded claimant permanent total disability benefits and found the Workers Compensation Fund responsible for the entire award. The Workers Compensation Fund requested this review and asks the Appeals Board to review the following issues:

- (1) Whether claimant timely filed her application for hearing.

- (2) What is the nature and extent of claimant's disability, if any.
- (3) What is the liability of the Workers Compensation Fund?

Those are the issues now before the Appeals Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds:

For the reasons stated below, both the Award and the Award Nunc Pro Tunc of the Administrative Law Judge should be modified.

Claimant began working for respondent in 1972 as a sheet metal assembler. On April 2, 1981, claimant injured her right arm and shoulder while bucking rivets. Claimant reported her injury to respondent's first aid department and was given ultrasound treatment. Although the respondent changed the parts of the aircraft she worked on, her symptoms worsened as she continued to work.

Claimant testified she saw several doctors for her injury, including board-certified orthopedic surgeon, Robert A. Rawcliffe, M.D., whom she saw on three occasions between June and August 1981. Although he could not arrive at a definitive diagnosis in August 1981, Dr. Rawcliffe suspected cervical osteoarthritis and advised claimant, at that time, to change jobs. When he released claimant to return to work in August 1981, he restricted her from overhead work and lifting greater than 35 pounds. At the time of her release, Dr. Rawcliffe was concerned claimant would aggravate her condition if she continued to do her regular work.

After her release from Dr. Rawcliffe, claimant continued to work for the respondent as a sheet metal assembler and experienced worsening symptoms. Although the record is not entirely clear, it appears claimant was off work numerous days in both September and November 1981. Claimant testified the work she performed after her return to work violated her work restrictions.

On May 10, 1982, the respondent placed claimant on leave of absence and advised her it would attempt to find her another job. Because respondent never recalled claimant, this is the last day claimant worked for the respondent. When she terminated, claimant had pain in her right shoulder, wrists, neck, right arm, and right hand and fingers.

The parties stipulated that claimant met with personal injury by accident arising out of and in the course of her employment with respondent on April 2, 1981 and that the respondent failed to report the accident to the Division of Workers Compensation as required by K.S.A. 1980 Supp. 44-557.

Claimant presented the deposition of Dr. Rawcliffe who testified he saw claimant in June, July and August 1981 as a referral from one of respondent's company physicians. His initial diagnostic impression was that claimant had degenerative disc disease with spurs causing pressure on spinal nerve routes primarily at the C6-7 intervertebral level. He referred claimant to a Wichita neurosurgeon who recommended a myelogram and lighter work. The neurosurgeon suspected, as did Dr. Rawcliffe, that claimant had a C7 neuropathy.

At her attorney's request, Dr. Rawcliffe saw claimant again on February 3, 1995. As a result of his most recent examination and evaluation, the doctor believes claimant has

a 10 percent whole body functional impairment as a result of her degenerative cervical disc disease and that she should now be restricted from work activities involving overhead work or activities requiring prolonged neck flexion. In addition, the doctor believes claimant should not do any work activities which require elevation of the shoulders or arms above mid-chest height and should not lift more than 10 pounds with either hand.

Dr. Rawcliffe believes claimant's present symptoms are compatible with severe degenerative disc disease and almost entirely the result of that condition. Because of the neck condition and related symptoms, he does not believe claimant could tolerate any type of employment. He believes claimant's condition has worsened over the years as a result of the natural progression of the disease and aging process.

After reviewing the description of claimant's job duties while working for the respondent, Dr. Rawcliffe testified claimant permanently aggravated and accelerated her underlying degenerative cervical disc disease as a result of the injury she described as occurring on April 2, 1981. However, he also believes claimant permanently aggravated and accelerated her underlying degenerative cervical disc disease as a result of the work she performed after April 2, 1981 until her last day of work on May 10, 1982.

(1) Based upon the entire record, the Appeals Board finds claimant filed timely application for hearing as required by K.S.A. 1980 Supp. 44-534(b). In Childress v. Childress Painting Co., 226 Kan. 251, 597 P.2d 637 (1979), the Kansas Supreme Court held that the three-year statute of limitations contained in K.S.A. 1980 Supp. 44-534(b) does not begin to run until respondent files its accident report with the Division of Workers Compensation. Because the parties stipulated the accident report was never filed as required by statute, the three-year period that claimant had to file her application for hearing never commenced.

The Workers Compensation Fund contends claimant should be barred from recovering benefits because of the equitable defense of laches. The doctrine of laches is not an appropriate defense in this proceeding for two reasons. First, the Workers Compensation Fund did not raise the defense before the Administrative Law Judge. Under K.S.A. 1995 Supp. 44-555c the Appeals Board reviews only those questions of law and facts as presented to the administrative law judge. Also see Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P. 2d 771 (1966). Second, the doctrine of laches is not applicable to a workers compensation proceeding. The defense is one founded in equity and not contained in the Kansas Workers Compensation Act which is complete, exclusive and establishes its own procedures, rights, obligations and defenses.

(2) The Appeals Board finds claimant sustained personal injury by accident arising out of and in the course her employment with the respondent on April 2, 1981. Based upon Dr. Rawcliffe's uncontroverted testimony, the Appeals Board finds claimant permanently aggravated her preexisting degenerative cervical disc disease in that accident and sustained permanent injury and impairment.

Because injury to the neck is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1980 Supp. 44-510e which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced."

Based on claimant's testimony at her deposition that a portion of her job duties as a sheet metal assembler neither required overhead work nor violated the lifting restrictions Dr. Rawcliffe gave her in August 1981, coupled with her testimony that she spent approximately one-half or more of her day performing those duties which did not violate her work restrictions, the Appeals Board finds that claimant sustained a 50 percent permanent partial general disability as a result of the April 2, 1981 accident.

The Appeals Board also finds that the claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent during the period she worked after being released with restrictions in August 1981. Claimant worked through May 10, 1982, when she finally left work due to her injuries. The Appeals Board finds claimant sustained additional permanent injury due to the work she performed between April 1981 and May 10, 1982 and is entitled to a 50 percent work disability for that injury also. However, a 100 percent credit under K.S.A. 44-510a (Ensley) is applicable because the injury and disability from the April 1981 accident contributes 100 percent to the injury and disability that resulted from the accidental injury that culminated on May 10, 1982. For purposes of computation of the Award for this second accident, the Appeals Board designates the last day of work, or May 10, 1982, as the date of accident.

Based upon the uncontroverted opinion of Dr. Rawcliffe, the Appeals Board finds claimant has proven that she is now permanently and totally disabled as a result of her work-related injuries. As Dr. Rawcliffe examined claimant on February 3, 1995 and that is the earliest date we have relating to the period that claimant's status changed to that of being permanently and totally disabled, that date will be used to commence the payment of permanent total disability benefits. Therefore, for her second accident claimant is entitled to a 50 percent work disability commencing May 10, 1982 followed by a period of permanent total disability commencing February 3, 1995, but subject to a 100 percent credit under K.S.A. 44-510a (Ensley).

(3) Because the respondent has failed to prove it had knowledge before April 1981 that claimant had an impairment that constituted a handicap, the Workers Compensation Fund is not responsible for any of the benefits payable as a result of the April 2, 1981 accident.

However, the Appeals Board finds the Workers Compensation Fund responsible for the benefits payable for the May 10, 1982 accident. Dr. Rawcliffe's testimony is uncontroverted that claimant's condition worsened because she continued to work and violated her work restrictions and limitations. His testimony is also uncontroverted that claimant would not have the nature of the impairment she has today but for the preexisting cervical disc disease. The evidence is clear that respondent returned claimant to work in August 1981 with knowledge of her permanent restrictions and ongoing problems. Therefore, respondent knew claimant was impaired and that the impairment was significant enough to constitute a handicap in her obtaining or retaining employment. The evidence is also clear and uncontroverted that claimant exceeded her restrictions and she sustained additional permanent injury and worsened symptoms due to the work she performed after August 1981. Under these facts, the Workers Compensation Fund is responsible for the entirety of the Award for the second accident.

As indicated above, the Workers Compensation Fund is entitled to a 100 percent credit under K.S.A. 44-510a (Ensley), for any period that the permanent disability benefits payable from the April 2, 1981 accident overlap with the permanent disability benefits payable for the May 10, 1982 accident.

The Workers Compensation Fund contends the respondent should be estopped from making claim against it because the respondent failed to timely file its report of accident. As indicated above, because this is not a defense contained in the Kansas Workers Compensation Act, which is complete and self-contained, the argument is without merit.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that both the Award and the Award Nunc Pro Tunc entered by Administrative Law Judge Nelsonna Potts Barnes dated September 13, 1995 and September 18, 1995, respectively, should be, and hereby are, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Donnela Burnside, and against the respondent, Cessna Aircraft Company, a self-insured, and the Workers Compensation Fund for an accidental injury which occurred April 2, 1981 and based upon an average weekly wage of \$410.19, for 415 weeks at the rate of \$136.74 per week for a 50% permanent partial general disability, making a total award of \$56,747.10 which is ordered paid in one lump sum less any amounts previously paid.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum upon proof of payment and may apply for future medical benefits with the Director.

The respondent is responsible for all the benefits and costs associated with this first accidental injury. Therefore, the respondent is ordered to pay all the medical expenses incurred by claimant between April 2, 1981 and when she returned to work on August 7, 1981.

### **AWARD**

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Donnela Burnside, and against the respondent, Cessna Aircraft Company, a self-insured, and the Workers Compensation Fund, for an accidental injury which occurred on May 10, 1982 and based upon an average weekly wage of \$410.19, for 415 weeks of permanent partial general disability benefits at the rate of \$136.74 per week for a 50% permanent partial general disability, less a credit in the sum of \$136.74 per week as provided by K.S.A. 44-510a (Ensley) for 357.43 weeks during the period May 11, 1982 to March 16, 1989.

Commencing February 3, 1995 claimant is entitled permanent total disability benefits in the sum of \$187.00 per week for a total award of \$100,000.00 less credits totalling \$48,874.98 for a net award of \$51,125.02.

As of March 22, 1996, there is due and owing claimant 357.43 weeks of permanent partial general disability benefits for the period May 11, 1982 to March 16, 1989 at the rate of \$136.74 per week, less credit in the sum of \$136.74 per week for a total of \$0.00, and 57.57 weeks of permanent partial general disability benefits at the rate of \$136.74 per week or \$7,872.12, plus 59.14 weeks of permanent total disability benefits at the rate of \$187.00 per week or \$11,059.18, for a total due and owing of \$18,931.30, less any amounts previously paid. Thereafter, the sum of \$32,193.72 is to be paid for 172.16 weeks at the rate of \$187.00 per week until fully paid or further order of the Director.

The Workers Compensation Fund is responsible for payment of all the benefits and costs associated with this second accident. Therefore, the Workers Compensation Fund is responsible for all the medical expenses incurred by claimant after her return to work on August 7, 1981.

Claimant is entitled to unauthorized medical benefits upon proof of payment and may apply for future medical benefits with the Director.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed 50% against the respondent and its insurance carrier and 50% against the Kansas Workers Compensation Fund to be paid directly as follows:

Deposition Services	
Transcript of Regular Hearing	\$270.80
Transcript of Regular Hearing Continued	\$ 72.00
Deposition of Robert Rawcliffe, Jr., M.D.	\$393.20
 Don K. Smith & Associates	
Deposition of Donnellda Burnside	\$374.50

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1996.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
Garry L. Howard, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director